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**THE NATIONAL MEMORIAL TO
THE PROGRESS OF THE COLORED
RACE IN AMERICA,**

Petitioner

v.

CASE NO. CLK980399

**HOWARD W. SMITH, SR.,
JOHN A. SMITH,
PAUL L. SMITH,
PETER L. SMITH,
MARION O. SMITH, SR.,
MARION O. SMITH, JR.,
JOEL L. SMITH, and
MARK C. SMITH,**

Respondents.

REPORT OF ALEXANDER F. SKIRPAN, JR., HEARING EXAMINER

April 21, 1999

On September 1, 1998, The National Memorial to the Progress of the Colored Race in America ("National Memorial" or "Petitioner"), a District of Columbia corporation, by counsel, filed a petition with the State Corporation Commission ("Commission") seeking an order expunging specified corporate documents of record in the Clerk's Office of the Commission as well as other relief described in the petition. Specifically, the Petitioner seeks the expungement of annual reports filed with the Commission on behalf of the National Memorial for the years 1994 through 1997. The Petitioner alleges that the annual reports for those years erroneously show the officers and directors of the National Memorial to be various combinations of Howard W. Smith, Sr.; John A. Smith; Paul L. Smith; Peter L. Smith; Marion O. Smith, Sr.; Marion O. Smith, Jr.; Joel L. Smith; and Mark C. Smith (collectively, the "Smiths" or "Respondents").

In a letter dated September 14, 1998, Marion O. Smith, Sr. explained that the National Memorial's certificate to do business in Virginia was terminated in 1985 and that he and his sons reactivated the National Memorial's certificate in 1993. By order dated October 22, 1998, the Commission docketed the petition, ordered the Respondents to file an Answer, and assigned the matter to a Hearing Examiner.

On November 19, 1998, the Respondents filed their Answer in which they traced their authority regarding the National Memorial to its original founder, Elder Lightfoot Solomon Michaux. A Hearing Examiner's ruling dated November 24, 1998, set a hearing date of February 4, 1999, and established a procedural schedule for the filing of prefiled testimony and

exhibits. Subsequent Hearing Examiner's rulings modified the hearing date and procedural schedule, with March 3, 1999, eventually established as the hearing date.

On December 22, 1998, the Petitioner filed a Motion for Summary Judgment Based on the Doctrine of Res Judicata ("Motion for Summary Judgment"). In its Motion for Summary Judgment, the Petitioner argued that prior litigation in the Circuit Court of James City County and Williamsburg conclusively established that the Smiths had never been officers or directors of the National Memorial. In this prior litigation, the Smiths sought to block a transfer of land from the Gospel Spreading Church to the James City County Bible and Agricultural Training School ("James City County School"). The Petitioner's Motion for Summary Judgment was denied in a Hearing Examiner's ruling dated January 13, 1999.

On March 3, 1999, a hearing was convened as scheduled for receiving evidence on the Petition. Representing the Petitioner at the hearing were Beverley L. Crump, Esquire, and Betty S. W. Graumlich, Esquire. James S. Ellenson, Esquire, represented the Smiths. Filed with this Report is a transcript of the hearing.

SUMMARY OF THE RECORD

In 1919, Elder Michaux founded the Church of God.¹ Over the years, Elder Michaux organized several corporations to further various aspects of his ministry. These other corporations included: (i) the National Memorial, which was incorporated in the District of Columbia in 1936;² (ii) The Gospel Spreading Church, Inc. ("GS Church") (formerly the Gospel Spreading Association ("GSA") as it continues to be known by in Virginia), which was incorporated in the District of Columbia in 1936;³ (iii) the James City County School, which was incorporated in Virginia in 1946;⁴ and (iv) the Gospel Spreading Association Foundation, Inc. ("GSA Foundation"), which was incorporated in the District of Columbia in 1957.⁵ During the meeting held on March 10, 1957, to establish the GSA Foundation, Elder Michaux provided the following description of the purpose and function of these corporations:

The GSA is the subsidiary of the Church of God. All of the properties and businesses of the Church of God, engaged in commerce, is done in the name of the GSA. The Church of God is the parent body, and it is the source of the spiritual inspiration of the service which we render, both material and spiritual through the GSA.

The . . . [James City County School] is also a subsidiary of the Church of God, an organization organized and incorporated for

¹ Exhibit JS-1, at 7.

² Exhibit JS-5; Exhibit PAC-48, at 1.

³ Exhibit JS-40, at 1; Exhibit JS-40; Exhibit PAC-48, at 1.

⁴ Exhibit PAC-48, at 1.

⁵ *Id.*

the purpose of teaching the bible and striving to curb juvenile delinquency.

The National Memorial is also a subsidiary of the Church of God . . . organized for the purpose of memorializing Negro leaders and to build a memorial to the progress of the Colored Race in America. Located at Jamestown where the first Negroes landed as slaves

The purpose of the . . . [GSA Foundation] is to receive funds contributed by the GSA, the . . . [James City County School], and the National Memorial as they are earned by them, and also to receive contributions, donations, trusts, and other gifts from any source⁶

Organizational documents of the GSA Foundation further show that income earned by the GSA Foundation was to be allocated between the GSA, James City County School, and National Memorial on a 50%, 30%, and 20% basis, respectively.⁷

The original Certificate of Incorporation, dated January 1936, described the purpose of the National Memorial as documenting the progress and contributions of African-American men and women.⁸ Specifically, the purpose of the National Memorial was:

[t]o raise the necessary funds for the acquisition and maintenance of the necessary property of a . . . [National Memorial], and for its endowment, with the following objectives, to-wit: (1) Historical, giving the Chronicles of the Colored Race in America; (2) Memorial, in the public recognition of the names of Colored men and women, “Not Born to Die”; (3) Humanitarian, in cooperation for every phase of advancement of the Colored people; (4) Cultural, in the progress of the Colored Race in education, the arts, and science; (5) Patriotic, but non-political, in teaching the Colored people the ideals of the Constitution of the United States and the Declaration of Independence; (6) Spiritual, but non-sectarian in promulgating the ideals of Theism and in opposition to atheism.⁹

In order to maintain its tax-exempt status the National Memorial amended its Charter in 1958.¹⁰ The Charter of the National Memorial was amended, again, in 1997, to avail itself of the District

⁶ Exhibit JS-9, at 2-3.

⁷ *Id.* at 6; Exhibit JS-42, at 2.

⁸ Exhibit JS-5.

⁹ Exhibit JS-5; Exhibit JBH-149, at 2.

¹⁰ Exhibit JBH-149.

of Columbia Non-Profit Corporation Act.¹¹ The amended Charters, while more detailed as to the aims and objectives of the National Memorial, remain consistent with the original purpose set forth above.

On August 1, 1936, Elder Michaux purchased approximately 454 acres along the James River near Jamestown, Virginia, for the National Memorial.¹² This land is near the site where the first African slaves arrived in North America in 1619.¹³ Subsequent purchases of adjacent tracts of land, some on behalf of the James City County School, increased the land held by the various organizations formed by Elder Michaux to over one thousand acres.¹⁴ Since then, this land has been referred to as “the National Memorial Farm,”¹⁵ “the Church Farm,”¹⁶ or “the Williamsburg Farm.”¹⁷

In 1943, Marion O. Smith, Sr., one of the Respondents, began living and working on the National Memorial Farm.¹⁸ Since then, Mr. Smith and his family have continued to live and to work on the farm.¹⁹ Mr. Smith claims that in 1950, Elder Michaux appointed him as overseer of the farm, a position he held throughout the remainder of Elder Michaux’s life.²⁰ Indeed, Mr. Smith produced a letter dated February 12, 1969, (the year following the death of Elder Michaux) from the attorney for the GS Church to Colony Farms Cooperative Dairy to advise them that Mr. Marion O. Smith “is now in charge of the total operations of the farm.”²¹ However, in a letter dated April 17, 1975, the same attorney, on behalf of the GS Church, the GSA, the James City County School, and the National Memorial, advised the Virginia Animal Breeders that Mr. Marion O. Smith “is no longer employed by any of the above organizations.”²² This letter also states that Mr. Smith’s future activities at the Williamsburg Farm will be as “a separate independent contractor.”²³

In June of 1958, the National Memorial applied for a certificate of authority to transact business in Virginia.²⁴ On June 17, 1958, the Commission issued a certificate of authority to

¹¹ Exhibit JS-12.

¹² Exhibit JS-13, at 3.

¹³ Exhibit MOS-81, at 7; Exhibit MOS-124, at 23; Exhibit JBH-150, Letter dated April 28, 1993.

¹⁴ Exhibit MOS-81, at 7; Exhibit MOS-124, at 23.

¹⁵ Exhibit MOS-78; Exhibit MOS-81, at 1.

¹⁶ Exhibit MOS-114; Exhibit MOS-124, at 23.

¹⁷ Exhibit MOS-66; Exhibit MOS-67.

¹⁸ Exhibit MOS-51, at 1.

¹⁹ Exhibit MOS-51, at 1, 11-12; Exhibit HWS-154, at 2; Exhibit JAS-158, at 1; Exhibit JLS-159, at 1; Exhibit MCS-160, at 1.

²⁰ Exhibit MOS-51, at 11.

²¹ Exhibit MOS-66.

²² Exhibit MOS-67.

²³ *Id.*

²⁴ Exhibit JS-5, at 4-5.

transact business in Virginia to the National Memorial.²⁵ The officers and directors of the National Memorial at that time were:

Elder Michaux	President and Director
Mary E. Michaux	Vice President and Director
Joseph A. Jones	Secretary and Director
Hattie E. Adams	Treasurer and Director
Rudolph Jones	Director ²⁶

The Petitioner claims that under Elder Michaux's leadership, the National Memorial, the GSA, the James City County School, and the GSA Foundation all had the same officers and directors.²⁷ For example, annual reports filed with the Commission for these entities for the years 1967 and 1968 all list their officers and directors as follows:

L. S. Michaux	President and Director
Mary E. Michaux (1967 only)	Vice President and Director
Joseph A. Jones	Secretary and Director
Hattie Adams (1968 only)	Treasurer
Rudolph Jones	Director
Jennie B. McRae	Director
F. D. Rainey	Director ²⁸

Annual reports filed with the Commission for the National Memorial, the GSA, and the James City County School for the years 1975 through 1984 reveal that these organizations continued to share the same officers and directors.²⁹ Moreover, these annual reports exhibit little change in the makeup of the officers and directors from year to year. For example, the officers and directors for these organizations in 1975 were:

Rudolph Jones	President and Director
Marion Butler	Secretary and Director
Madge West	Treasurer and Director
F. D. Rainey	Director
Jennie B. McRae	Director
Ruth Michaux	Director
William Shepherd	Director ³⁰

The annual reports for 1984 list the officers and directors for these organizations as follows:

²⁵ Exhibit MOS-132; Exhibit MOS-134.

²⁶ Exhibit JS-5, at 4.

²⁷ Exhibit JS-1, at 7-8.

²⁸ Exhibit JS-3; Exhibit JS-4.

²⁹ Exhibits JS-18 through JS-27.

³⁰ Exhibit JS-18.

Rudolph Jones
Marion Butler
Madge West
Ruth Michaux
William Shepherd
James Stokes
James Edwards

President and Director
Secretary and Director
Treasurer and Director
Director
Director
Director
Director³¹

In 1985, the National Memorial ceased filing annual reports with the Commission.³² However, the GSA and the James City County School continued to file annual reports with the Commission.³³ The annual reports filed after 1984 for the GSA and the James City County School continue the pattern of interlocking officers and directors with little or no change in the roster of officers and directors from year to year.³⁴

On June 27, 1985, Rudolph Jones informed the Commission that “we are no longer doing business under . . . [the National Memorial] name.”³⁵ On September 1, 1985, the Commission revoked the certificate of authority of the National Memorial to transact business in Virginia.³⁶ The Petitioner now characterizes its failure to file annual reports on behalf of the National Memorial beginning in 1985, as well as Mr. Jones’ letter as mistakes.³⁷

Throughout this time, the Smiths continued to live and work on the National Memorial Farm.³⁸ However, several issues arose between the Smiths and the officers and directors of the GS Church ranging from the use and sale of farmland to the practices and teaching of the Church of God.³⁹

In 1992, the Smiths learned of the revocation of the certificate of authority of the National Memorial to transact business in Virginia.⁴⁰ In addition, the Smiths learned that the National Memorial continued to be a corporation incorporated in the District of Columbia, and came to believe that the National Memorial did not have an active board of directors.⁴¹ Based upon these representations, the Commission provided the Smiths with the forms to reactivate the certificate

³¹ Exhibit JS-27.

³² Exhibit JS-1, at 9.

³³ Exhibits JS-28 through JS-40.

³⁴ *Id.*

³⁵ Exhibit JS-43, at 1.

³⁶ *Id.* at 2.

³⁷ Exhibit JS-1, at 9-10; Stokes, Tr. at 60-61, 64.

³⁸ Exhibit MOS-51, at 1, 11-12; Exhibit HWS-154, at 2; Exhibit JAS-158, at 1; Exhibit JLS-159, at 1; Exhibit MCS-160, at 1.

³⁹ Exhibit JS-1, at 11-12; Exhibit JS-10; Exhibit MOS-51, at 11-12; Exhibit MOS-70; Exhibit MOS-125; M. O. Smith, Tr. at 157-58; J. A. Smith, Tr. at 187.

⁴⁰ Exhibit MOS-51, at 7; Exhibit MOS-65, at 2.

⁴¹ *Id.*

of authority of the National Memorial to transact business in Virginia.⁴² On September 3, 1993, the Smiths filed an application for a certificate of authority to transact business in Virginia for the National Memorial, naming themselves as officers and directors.⁴³ The Commission approved the application filed by the Smiths on September 23, 1993.⁴⁴

The Petitioner contends that the Smiths' belief that the National Memorial did not have an active board of directors in 1992 was wrong.⁴⁵ In this regard, Marion Smith, Sr. admitted during cross-examination that the Smiths failed to investigate whether the National Memorial had an active board in 1992.⁴⁶ In response to the issuance of a certificate by the Commission to the Smiths, the board of the GS Church transferred all of the land owned by the National Memorial to the James City County School.⁴⁷ In 1994, the Smiths filed suit in James City County Circuit Court⁴⁸ to set aside the deed that transferred the land from the National Memorial to the James City County School.⁴⁹ However, in November of 1995, the Smiths and the board of GS Church settled that dispute with the Smiths agreeing to withdraw their Bill of Complaint and have it dismissed with prejudice.⁵⁰ On December 6, 1995, the court dismissed, with prejudice, the Bill of Complaint brought by the Smiths.⁵¹

For the years 1994 through 1997, the Smiths filed annual reports with the Commission on behalf of the National Memorial, listing themselves as officers and directors.⁵² On September 1, 1998, the Petitioner filed this case, seeking an order to expunge the annual reports filed on behalf of the National Memorial by the Smiths for 1994 through 1997.

In support of its petition, the National Memorial prefiled the direct and rebuttal testimonies of: (i) James Stokes, business manager for the Church of God;⁵³ (ii) Marion J. Butler, secretary and director for the National Memorial, GS Church, James City County School, and GSA Foundation;⁵⁴ and (iii) P. Anthony Coates, director of the National Memorial, GS Church, and James City County School.⁵⁵ Generally, these witnesses contend that they are the true directors of the National Memorial, which, following the tradition established by Elder Michaux, has the same board as the GS Church, the James City County School, and the GSA Foundation.⁵⁶

⁴² *Id.*; Exhibit MOS-60.

⁴³ Exhibit MOS-54.

⁴⁴ Exhibit MOS-53.

⁴⁵ Exhibit JS-1, at 11.

⁴⁶ M. O. Smith, Tr. at 152-53.

⁴⁷ Exhibit MOS-71.

⁴⁸ Chancery No. 10783.

⁴⁹ Exhibit JS-13.

⁵⁰ Exhibit MOS-104.

⁵¹ Exhibit JS-15.

⁵² Exhibits MOS-56 through 59.

⁵³ Exhibit JS-1; Exhibit JS-41.

⁵⁴ Exhibit MJB-45; Exhibit MJB-47.

⁵⁵ Exhibit PAC-48; Exhibit PAC-50.

⁵⁶ Exhibit JS-1, at 7-10; Exhibit MJB-45, at 2-5; Exhibit PAC-48, at 2-3.

Mr. Stokes also discusses the failure of the National Memorial to qualify to transact business in Virginia in 1985 and addresses other actions taken by the Smiths.⁵⁷

The Respondents prefiled the direct and rebuttal testimonies of Marion O. Smith, Sr.⁵⁸, Joyce Hopson,⁵⁹ Howard Smith,⁶⁰ John A. Smith,⁶¹ Joel L. Smith, Sr.⁶², and Mark C. Smith.⁶³ These testimonies, especially the testimony of Mr. Marion Smith, recount their understanding of Elder Michaux's vision and plans for the National Memorial.⁶⁴ In addition, Marion Smith testifies that Elder Michaux appointed him to oversee and protect the National Memorial.⁶⁵ Thus, in answer to why the Smiths filed for a certificate to do business in Virginia in 1993, Marion Smith states:

I made every effort to find out why . . . [the National Memorial] was no longer registered to do business in Virginia and why the land of [t]he National Memorial was being transferred to other organizations. . . . Having made a promise to Elder Michaux, it was my duty to form a new board in Washington and register the [c]orporation in Virginia⁶⁶

During the hearing, Marion Smith further explained his actions of behalf of the National Memorial as follows:

Now, when I found out that the National Memorial had been dissolved, it raised . . . my concern, because I was responsible for the land for the benefit of the people of God, to watch over it, to care for it, just like Nabo[th] was.

You remember the story of Nabo[th]. He was sent over the heretics for Israel, to watch over and care for their vineyards, but old King Ahab, he got jealous. The same thing about this Board, they got jealous. They wanted to take the farm from me, kill everything that Elder Michaux said or done, and do what they wanted to do with the land. And I refused, and I sit here today to tell you I refused.

⁵⁷ Exhibit JS-1, at 10-13.

⁵⁸ Exhibit MOS-51; MOS-52.

⁵⁹ Exhibit JBH-144.

⁶⁰ Exhibit HWS-154.

⁶¹ Exhibit JAS-158.

⁶² Exhibit JLS-159.

⁶³ Exhibit MCS-160.

⁶⁴ Exhibit MOS-51, at 6, 10-13; Exhibit HWS-154, at 3-5; Exhibit JAS-158, at 1-4; Exhibit JLS-159, at 1-4; Exhibit MCS-160, at 1-4.

⁶⁵ Exhibit MOS-51, at 7, 10-13.

⁶⁶ *Id.* at 7.

...

Of course, you can do anything you want to do, but nevertheless, I'm going to stand for that which is right, and I'm going to stand for that which Elder Michaux told me to do, until the day I die.⁶⁷

The Smiths also point out in their direct testimony that when they filed suit in James City County Circuit Court to set aside the deed that transferred all land from the National Memorial to the James City County School, in paragraph number one of their Bill of Complaint, they alleged, among other things, that they were the officers and directors of the National Memorial.⁶⁸ In the Answer filed by the Petitioner in this case, the Petitioner stated that it did not have sufficient information to admit or deny the allegation.⁶⁹ On rebuttal, the Petitioner explains that its counsel filed the earlier Answer without review by the board of directors.⁷⁰ The Petitioner now contends that it should have denied the allegation.⁷¹

The Respondents also presented the testimony of Joyce Hopson who provided the results of her analysis of the history of the National Memorial, the Church of God, and Elder Michaux.⁷² The Respondents prefiled, but did not offer testimonies and exhibits attributed to Peter Smith and Carla Ebbert. These testimonies and exhibits were not marked as exhibits or entered into the record.

DISCUSSION

This case presents the Commission with at most, three issues. First, does the Petitioner have standing to maintain this case before the Commission? Second, if the Petitioner has standing to maintain this case before the Commission, were the annual reports filed with the Commission on behalf of the National Memorial for the years 1994, 1995, 1996, and 1997, correct? Third, if the annual reports filed with the Commission on behalf of the National Memorial for the years 1994 through 1997 are incorrect, what action should or can the Commission take? Each of these issues will be discussed separately below.

Standing

The Petitioner claims that the Smiths acted without authorization when they secured a certificate of authority to transact business in Virginia for the National Memorial and that the

⁶⁷ M. O. Smith, Tr. at 157-58.

⁶⁸ Exhibit MOS-51, at 8-9; Exhibit HWS-154, at 5-6; Exhibit JAS-158, at 4-5; Exhibit JLS-159, at 4-5; Exhibit MCS-160, at 4-5.

⁶⁹ *Id.*; Exhibit JS-13, at ¶ 1; Exhibit JS-14, at ¶ 1.

⁷⁰ Exhibit JS-41, at 2-3; Exhibit MJB-47, at 2-3; Exhibit PAC-50, at 2-3.

⁷¹ *Id.*

⁷² Exhibit JBH-144; Exhibit JBH-145; Exhibit JBH-152; Exhibit JBH-153.

Smiths are not, and have never been, duly appointed officers and directors of the National Memorial.⁷³ Consequently, the National Memorial petitioned the Commission to expunge its records of annual reports filed on behalf of the National Memorial that erroneously list the Smiths as officers and directors. But, taking the National Memorial's petition at face value, the validity of the certificate of authority to transact business in Virginia for the National Memorial procured by the Smiths also becomes suspect. The absence of a valid certificate of authority, in turn, raises the question of whether the Petitioner has standing to maintain this case before the Commission.

Virginia Code § 13.1-919 A prohibits a foreign corporation from transacting business in Virginia "until it obtains a certificate of authority from the Commission." Section 13.1-919 B provides a listing of activities that do not constitute transacting business. Included in this list is "[m]aintaining, defending, or settling any proceeding;" and "[o]wning, without more, real or personal property."⁷⁴ The consequences of transacting business without authority are described in Virginia Code § 13.1-920. One of these consequences is that "[a] foreign corporation transacting business in this Commonwealth without a certificate of authority may not maintain a proceeding in any court of this Commonwealth until it obtains a certificate of authority."⁷⁵ Moreover, if a foreign corporation transacts business in Virginia without a certificate of authority, "each officer, director or employee who transacts any of such business in this Commonwealth knowing that a certificate of authority is required shall be liable for a penalty of not less than \$500 and not more than \$5,000."⁷⁶

In this case, the Petitioner can maintain its action before the Commission under one of two circumstances. The Petitioner may claim (i) that the certificate of authority obtained by the Smiths is valid, or (ii) that the Petitioner does not transact business in Virginia and is not required to have a certificate of authority. During the hearing, counsel for the Petitioner argued that the National Memorial no longer transacts business in Virginia and, therefore, a certificate of authority is not required.⁷⁷

As previously described, all land owned by the National Memorial was transferred to the James City County School in 1993 or 1994.⁷⁸ Petitioner's witness P. Anthony Coates testified that the James City County School is the entity that operates the farm on that land.⁷⁹ Thus, if the Petitioner's testimony is correct, it appears that the National Memorial no longer transacts business in Virginia. The only evidence in the record that suggests otherwise is a financial statement for the National Memorial for 1995 attached to the minutes of a meeting of the board of directors for the National Memorial, or Petitioner, dated October 5, 1996.⁸⁰ The attached financial statement shows 1995 farm and rent revenues for the National Memorial to be

⁷³ Exhibit JS-1, at 11.

⁷⁴ Virginia Code § 13.1-919 B(1) and (8).

⁷⁵ Virginia Code § 13.1-920 A.

⁷⁶ Virginia Code § 13.1-920 E.

⁷⁷ Crump, Tr. at 11.

⁷⁸ Exhibit MOS-71.

⁷⁹ Coates, Tr. at 114-15.

⁸⁰ Exhibit JS-11.

\$7,430.14, and expenses for seed, chemicals, insurance, real estate tax, legal, and miscellaneous to total \$19,703.60.⁸¹ Neither the Petitioner nor the Respondents have offered any evidence of the National Memorial owning land or having business interests outside of the Commonwealth. Therefore, at least as of December 1995, the record indicates that the National Memorial, or Petitioner, probably was transacting business in Virginia.

Based on the testimony of Mr. Coates and representations by counsel for the Petitioner, I find that the Petitioner has standing to maintain this proceeding. Possible business transactions from 1995, when the status or ownership of the land was subject to litigation, are not dispositive of whether the Petitioner currently is transacting business. The transfer of the land and the settlement of the suit challenging that transfer are factors that tend to support the plausibility of the testimony supplied by Mr. Coates. Consequently, I find that the Petitioners may maintain this proceeding before the Commission.

Officers and Directors for 1994-1997

Annual reports filed with the Commission for non-stock foreign corporations contain little more than the names and addresses of the corporation and the corporation's registered agent, officers, and directors.⁸² Thus, at the heart of this case is the factual determination of the officers and directors for the National Memorial for the years 1994 through 1997.

As filed with the Commission by the Respondents, the annual report for the National Memorial for 1994 shows the officers and directors to be as follows:⁸³

Marion O. Smith	Chairman and Director
Howard W. Smith	President, Secretary and Director
John A. Smith	Secretary, Treasurer and Director
Marion O. Smith, Jr.	President
Peter L. Smith	Treasurer
Joel L. Smith	Director
Mark C. Smith	Director

Similarly, annual reports filed with the Commission for the National Memorial for 1995 through 1997, provide the following individuals as officers and directors:⁸⁴

Marion O. Smith, Sr.	Chairman and Director
Howard W. Smith, Sr.	President and Director
John A. Smith	Secretary and Director
Paul L. Smith	Treasurer (1995 only) and Director
Mark C. Smith	Director

⁸¹ *Id.*

⁸² *See, e.g.*, Exhibits MOS-56 through MOS-59.

⁸³ Exhibit MOS-56.

⁸⁴ Exhibit MOS-57; Exhibit MOS-58; Exhibit MOS-59.

On the other hand, the Petitioner claims that the officers and directors for the National Memorial for 1994 through 1997, were:⁸⁵

James Riddick	President and Director
Marion Butler	Secretary and Director
Madge West	Treasurer and Director
William Shepherd	Director
James Stokes	Director
P. Anthony Coates	Director

In support for its contention, the Petitioner claims that since 1957, the corporate entities organized by Elder Michaux to carry on the ministry of his Church of God have always maintained interlocking officers and boards of directors.⁸⁶ Consequently, the officers and directors for the National Memorial are identical to the officers and directors for the GSA and the James City County School. Annual reports filed with the Commission for 1994 through 1997, for the GSA and the James City County School all show the same officers and directors as the Petitioner lists for the National Memorial.⁸⁷ Furthermore, the Petitioner argues that the corporate existence of National Memorial has continued, unbroken, since its founding in 1936.⁸⁸ After 1985, when the National Memorial erroneously allowed its authority to transact business in Virginia to lapse, the National Memorial continued its corporate existence in the District of Columbia, including maintaining its slate of officers and directors. Indeed, Petitioner witnesses James Stokes, Marion Butler, and P. Anthony Coates testified to being directors of the National Memorial continuously since 1982, 1968, and 1989, respectively.⁸⁹

The Respondents counter that Elder Michaux appointed Marion Smith, Sr. to oversee and protect the National Memorial.⁹⁰ Based on this belief and upon finding the National Memorial no longer registered to transact business in Virginia, the Smiths filed for a certificate of authority from the Commission in 1993, naming themselves as officers and directors.⁹¹ Moreover, the Smiths contend that as the current board of the Church of God has moved away from the teaching and desires of Elder Michaux, they, the Smiths, remain the only board that continues to have the authority to carry on the work of Elder Michaux.⁹² For example, as counsel for the Respondents explained, “Board members have to be members of the Church of God, and to these Smiths, my

⁸⁵ Exhibit JS-1, at 9.

⁸⁶ *Id.*, at 8; Exhibit MJB-45, at 2-5; Exhibit PAC-48, at 2-5; Crump, Tr. at 195-97.

⁸⁷ Exhibits JS-37 through JS-40.

⁸⁸ Exhibit JS-41, at 1; Crump, Tr. at 198-99.

⁸⁹ Exhibit JS-2; Exhibit MJB-45, at 1; and Exhibit PAC-48, at 1.

⁹⁰ Exhibit MOS-51, at 7, 10-12; M. O. Smith, Tr. at 157-58.

⁹¹ Exhibit MOS-51, at 7; Exhibit MOS-54.

⁹² Exhibit MOS-51, at 11-12; M. O. Smith, Tr. at 157-58; Ellenson, Tr. at 185-86; H. Smith, Tr. at 187-88.

clients, they are the only true members of the Church of God, and they are the only persons who could be – sit as directors of the Board to the National Memorial.”⁹³

The Smiths also attempt to raise a collateral estoppel argument. As described above, in the Bill of Complaint to Set Aside Deed filed by the Smiths in James City County Circuit Court concerning the transfer of land from the National Memorial to the James City County School, the Smiths alleged that they were the officers and directors of the National Memorial.⁹⁴ In its Answer, the GS Church stated that they did not have sufficient information to admit or deny the Smith’s allegation.⁹⁵ Based on that Answer, the Smiths now argue that the Petitioner in this case is estopped, as a matter of law, from averring anything else.⁹⁶ In addition, the Smiths attempt to use the Answer filed by the GS Church in the earlier James City County Circuit Court case as proof that when the Smiths registered the National Memorial there were no other officers or directors in place.⁹⁷

The Commission has limited regulatory authority in regards to foreign corporations. More specifically, Virginia Code § 13.1-923 C provides that the Virginia Nonstock Corporation Act “does not authorize this Commonwealth to regulate the organization or internal affairs of a foreign corporation authorized to transact business in this Commonwealth.” Accordingly, the Commission’s inquiry as to the identity of the officers and directors of the National Memorial must be limited to the organization as it exists in the District of Columbia. In other words, this Commission cannot create or change the board of directors for a corporation organized under the laws of the District of Columbia. If the National Memorial was in existence in the District of Columbia, with officers and a board of directors in 1993 when the Smiths applied for a certificate of authority from the Commission, this Commission only could accept those officers and directors. At that time, the Commission did not have the power to make the Smiths officers and directors if they, in fact, were not officers and directors of the National Memorial in the District of Columbia.

Neither party questions the continued corporate existence of the National Memorial as a District of Columbia corporation. Indeed, Marion Smith testified that in 1992, the Smiths “found that the . . . [National Memorial] was still registered in DC”⁹⁸ Moreover, the Smiths do not contend that they were the officers and directors of the National Memorial in 1992. Rather, the Smiths claimed that because there was no active board in 1992, they, the Smiths formed a board.⁹⁹ As discussed previously, on cross-examination, Marion Smith admitted that he did not conduct any investigation to determine whether there was an active board.¹⁰⁰ More importantly, it does not appear that the Smiths ever tried to register their board in the District of Columbia.

⁹³ Ellenson, Tr. at 185-86.

⁹⁴ Exhibit JS-13, at ¶ 1.

⁹⁵ Exhibit JS-14, at ¶ 1.

⁹⁶ Ellenson, Tr. at 203.

⁹⁷ Exhibit MOS-52, at 3.

⁹⁸ Exhibit MOS-51, at 7.

⁹⁹ *Id.*

¹⁰⁰ M. O. Smith, Tr. at 152.

Because the District of Columbia did not require the filing of annual reports by charitable, non-stock corporations, official records filed and accepted by the District of Columbia are limited.¹⁰¹ Nonetheless, the Petitioner did file a certified copy of an election by the National Memorial to avail itself of the provisions of the District of Columbia Non-Profit Corporation Act.¹⁰² Contained in this election is a listing of officers and directors for the National Memorial that matches the list of officers and directors presented by the Petitioner.¹⁰³ Thus, at least for 1997, the Petitioner presents official recognition by the District of Columbia of the officers and directors it claims for the National Memorial. Furthermore, four of the six officers and directors listed on the filing certified to by the District of Columbia, (Marion Butler, Madge West, William Shepherd, and James Stokes) were listed as officers and directors for the National Memorial in the 1984 annual report filed with the Commission.¹⁰⁴ Given the continued, unbroken existence of the corporation, and the testimony of Marion Butler and James Stokes, I find that the officers and directors claimed by the Petitioner for the National Memorial for the intervening years were the officers and directors for the National Memorial.

The demonstrated interlocking of the boards of the corporations organized by Elder Michaux further supports this finding. For example, annual reports filed with the Commission for 1967, 1968, and 1975 through 1984, for the National Memorial, the GSA, and the James City County School show that all of these organizations shared the same officers and directors.¹⁰⁵ With the exception of the annual reports filed by the Smiths, none of the annual reports filed for these organizations contains a variance in officers and directors for any specific calendar year.

Finally, the Petitioner is not estopped from averring that the Respondents are not the officers and directors of the National Memorial. Generally, collateral estoppel, or the preclusion of an issue in a subsequent and different cause of action, requires that the issue actually be litigated and essential to a valid and final judgment in the initial proceeding.¹⁰⁶ Here, the initial proceeding, or the James City County Circuit Court case, was settled, not litigated, with the matter dismissed with prejudice against the Respondents.¹⁰⁷ Moreover, Rule 1:4(e) of the Rules of Supreme Court of Virginia provides that “[a]n allegation in a pleading that the party does not know whether a fact exists shall be treated as a denial that the fact exists.” In other words, an answer that states that the party does not possess sufficient information to either admit or deny an allegation has the technical legal effect of denying the allegation. Therefore, the Petitioner in this proceeding is not barred, as a matter of law, from asserting that the Smiths are not the officers and directors of the National Memorial.

¹⁰¹ Stokes, Tr. at 80.

¹⁰² Exhibit JS-12.

¹⁰³ *Id.*

¹⁰⁴ Exhibit JS-27.

¹⁰⁵ Exhibit JS-3; Exhibit JS-4; Exhibits JS-18 through JS-27.

¹⁰⁶ *Greene v. Warrenton Prod. Credit Ass’n*, 223 Va. 462 (1982).

¹⁰⁷ Exhibit JS-15.

The Respondents correctly argue that the Answer filed by the GS Church in the earlier James City County Circuit Court case can be used as evidence that there were no other officers or directors in place when the Smiths registered the National Memorial. However, I find this evidence is of limited value in light of the Petitioner's explanation that it erred in its earlier Answer.¹⁰⁸ As explained above, the record overwhelmingly supports the Petitioner's position that at the time the Smiths registered the National Memorial in Virginia, a preexisting and duly elected slate of officers and directors existed and continued to be in place. Consequently, the annual reports of the National Memorial filed with the Commission by the Smiths for the years 1994, 1995, 1996, and 1997, are incorrect as they do not list the actual officers and directors of the corporation.

Action to be taken by the Commission

The Petitioner asks that the Commission expunge from its records annual reports filed on behalf of the National Memorial by the Smiths.¹⁰⁹ In the alternative, the Petitioner seeks a Commission order "reflecting that those records are inaccurate and allow the filing of corrected records."¹¹⁰ The Petitioner argues that it is important for the public that wishes to deal with the National Memorial to know who is authorized to act on its behalf.¹¹¹ In this case, the need for clarity of authority is magnified by the historical significance of the National Memorial Farm as the place where the first African slaves landed in America and as the possible future home of the Jamestown Slave Museum. Moreover, the Petitioner points out that only the Commission has authority to regulate the affairs of its Clerk's Office.¹¹²

In maintaining that the Commission has the authority to grant the relief requested, the Petitioner relies on the Commission's general powers rather than a more specific statutory directive.¹¹³ Article IX, §§ 2 and 5 of the Constitution of Virginia generally vest the Commission with the responsibility of administering the laws adopted for the regulation and control of corporations doing business in the Commonwealth. In order to meet its responsibilities, the General Assembly granted the Commission the following powers:

In the administration and enforcement of all laws within its jurisdiction, the Commission shall have the power to promulgate rules and regulations, to impose and collect such fines or other penalties as are provided by law, to enter appropriate orders, and to issue temporary and permanent injunctions. The Commission is empowered to suspend or revoke any Commission-issued license, certificate, registration, permit, or any other Commission-issued

¹⁰⁸ Exhibit JS-41, at 2-3.

¹⁰⁹ Crump, Tr. at 24.

¹¹⁰ *Id.*

¹¹¹ Exhibit JS-1, at 13.

¹¹² Crump, Tr. at 200.

¹¹³ *Id.* at 201.

authority of any person who fails to satisfy any fine or penalty imposed by an order of the Commission.¹¹⁴

In addition, the General Assembly, by statute, has established several subordinate employees of the Commission including the clerk of the Commission.¹¹⁵ Among the duties enumerated, the clerk of the Commission shall:

Subject to the supervision and control of the Commission, have custody of and preserve all of the records, documents, papers, and files of the Commission, or which may be filed before it in any complaint, proceeding, contest, or controversy, and such records, documents, papers, and files shall be open to public examination in the office of the clerk to the same extent as the records and files of the courts of this Commonwealth.¹¹⁶

While the Commission is not required by rule or statute to investigate the accuracy of annual reports from foreign corporations filed in its clerk's office, in this situation, where inaccurate information has been proven and where the general public has or is likely to be misled by the inaccurate information, I find the Petitioner is correct in that the Commission possess general power to order the expungement of erroneous records from its clerk's office. Thus, either of the remedies proposed by the Petitioner represents a workable solution to this case.

Nonetheless, expungement of the National Memorial's annual reports for 1994 through 1997, or permitting the National Memorial to file corrected annual reports for 1994 through 1997, as proposed by the Petitioner fails to address the status of the National Memorial's certificate of authority to do business in Virginia. That certificate was obtained based on an application that contained false information filed by the Smiths who had no authority to act on behalf of the National Memorial. Therefore, I find the certificate of authority to do business in Virginia issued to the National Memorial in 1993 to be *void ab initio*. Accordingly, in addition to ordering the expungement of the annual reports filed by the Smiths on behalf of the National Memorial for 1994 through 1997, the Commission should void the certificate of authority of the National Memorial retroactive to September 23, 1993.

Finally, the Petitioner testified that the National Memorial currently does not own any land in the Commonwealth and does not conduct any business in Virginia.¹¹⁷ Thus, it appears that the National Memorial no longer requires a certificate of authority to do business in Virginia. Nonetheless, the record indicates that the Petitioner may not have complied with Virginia certificate requirements in the past. Therefore, I recommend that the Commission's order specifically place the National Memorial on notice that its officers and directors will be subject to

¹¹⁴ Va. Code § 12.1-13.

¹¹⁵ Va. Code § 12.1-19.

¹¹⁶ Va. Code § 12.1-19(2).

¹¹⁷ Exhibit MOS-71; Coates, Tr. at 114-15.

the statutory penalties of Virginia Code § 13.1-920 if the National Memorial conducts business in Virginia without a certificate of authority.

FINDINGS AND RECOMMENDATIONS

In conclusion, based on the evidence received in this case, I find that:

- (1) The National Memorial is a non-stock corporation incorporated in the District of Columbia in 1936;
- (2) The National Memorial has continued to exist as a District of Columbia corporation since its inception;
- (3) The National Memorial held a certificate of authority to transact business in Virginia from June 17, 1958 through September 1, 1985;
- (4) The National Memorial has had officers and a board of directors throughout its existence, including the years 1992 through 1997;
- (5) The current officers and board of directors for the National Memorial include James Riddick, Marion Butler, Madge West, William Shepherd, James Stokes, and James Edwards;
- (6) The Smiths were not authorized to act on behalf of the National Memorial when they filed an application for a certificate of authority to transact business in Virginia for the National Memorial in 1993;
- (7) The application for a certificate of authority to transact business in Virginia for the National Memorial filed in 1993 by the Smiths incorrectly listed the Smiths as officers and directors of the National Memorial;
- (8) The annual reports filed with the Commission on behalf of the National Memorial for the years 1994 through 1997, incorrectly list the Smiths as officers and directors of the National Memorial;
- (9) The annual reports filed with the Commission on behalf of the National Memorial for the years 1994 through 1997, incorrectly list James T. Wood as the registered agent for the National Memorial; and
- (10) Currently, the National Memorial does not transact business in Virginia.

Accordingly, ***I RECOMMEND*** the Commission enter an order that:

- (1) ***ADOPTS*** the findings in this Report;

(2) **VOIDS** *ab initio* the certificate of authority to transact business in Virginia granted to the National Memorial on September 23, 1993;

(3) **EXPUNGES** from its records annual reports filed on behalf of the National Memorial for the years 1994 through 1997;

(4) **DIRECTS** the officers and directors of the National Memorial to obtain a certificate of authority from the Commission before transacting business in Virginia; and

(5) **DISMISSES** this matter from the Commission's docket of active cases.

COMMENTS

Pursuant to § 12.1-31 of the Virginia Code and Commission Rule 5:12(e), the parties are advised that any comments to this Report must be filed with the Clerk of the Commission in writing, in an original and fifteen (15) copies, within twenty-one (21) days from the date hereof. The mailing address to which any such filing must be sent is Document Control Center, P. O. Box 2118, Richmond, Virginia 23218. Any party filing such comments shall attach a certificate to the foot of such document certifying that copies have been mailed or delivered to all other counsel of record and to any party not represented by counsel.

Respectfully submitted,

Alexander F. Skirpan, Jr.
Hearing Examiner